

February 6, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Marc A. Wendling

Date of Filing: January 8, 2008

Case Number: TFA-0241

This Decision concerns an Appeal that was filed by Bruce A. Spanner, on behalf of his client Marc A. Wendling, from a determination issued to him by the Richland Operations Office (Richland) of the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004, and the Privacy Act, 5 U.S.C. § 552a, as implemented by the DOE in 10 C.F.R. Part 1008.

I. Background

In an October 15, 2007 request to Richland, Mr. Spanner sought, “Documents submitted by or on behalf of Eberline Services, and all responses or other documents prepared by or at the request of the Department of Energy or any of its contractors thereto concerning the denial of access to Hanford to Marc Wendling.” Electronic FOIA Request Confirmation, Request Number 20071015012803 (October 15, 2007). In a subsequent telephone conversation with Richland, Mr. Spanner requested a copy of Mr. Wendling’s DOE Personnel Security File (PSF). Appeal at 1.

On December 3, 2007, Richland issued a determination letter to Mr. Spanner, with which it provided a copy of those documents in Mr. Wendling’s PSF that originated within DOE. Letter from Dorothy Riehle, Privacy Act Officer, Richland, to Bruce A. Spanner, Miller, Mertens, Spanner & Comfort, PLLC (December 3, 2007) (Determination Letter) at 1.¹ Richland also stated that “records in the possession of Eberline Services, Inc., a [DOE subcontractor], are not considered agency records and therefore, not subject to FOIA or the [Privacy Act].” Determination Letter at 1.

¹ In its determination, Richland informed Mr. Spanner that it could not release documents in Mr. Wendling’s PSF that were created by the U.S. Office of Personnel Management (OPM). Determination Letter at 1. Richland therefore forwarded a copy of the request to OPM, so that it could respond to Mr. Spanner directly. *Id.*

In his appeal, Mr. Spanner states,

Mr. Wendling was denied access to Hanford under the security protocols administered by the [DOE]. . . . However, and inexplicably, Mr. Wendling's [PSF] contains no reference at all to the denial of access or to the reversal thereof. I have been advised that a denial of access is initiated by correspondence from a contractor to the [DOE]. I would have expected this letter and all other related correspondence to have been produced by the [DOE].

Appeal at 1.

Below, we address the two issues pertinent to the present Appeal. The first issue is whether Richland performed an adequate search for documents responsive to Mr. Spanner's request. The second is whether certain of the documents located by Richland are subject to release under the FOIA statute, the Privacy Act, or DOE regulations.

II. Analysis

A. Adequacy of Richland's Search for Responsive Documents

In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted).² "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Todd J. Lemire*, 28 DOE ¶ 80,239 (August 26, 2002) (Case No. VFA-0760).

In reviewing this Appeal, we contacted Richland to ascertain the scope of its search for responsive documents. Richland informed us that it searched its Security and Emergency Services Division. Electronic Mail from Dorothy C. Riehle, Richland, to Steven Goering, OHA (January 9, 2008). That search located Mr. Wendling's PSF. *Id.* Richland believed that other responsive documents might be in the possession of Mr. Wendling's former employer, Eberline Services Hanford, Inc. (ESHI), a DOE subcontractor. Electronic Mail from Dorothy C. Riehle, Richland, to Steven Goering, OHA (January 17, 2008). However, Richland determined that the only responsive documents in the possession of ESHI were in Mr. Wendling's personnel file, and therefore were not subject to release under the FOIA, the Privacy Act, or the DOE FOIA regulations. Electronic Mail from Dorothy C. Riehle, Richland, to Steven Goering, OHA (January 9, 2008). We address the determination as to the status of the documents in Mr. Wendling's personnel file separately in section II.B below.

² Unlike the Freedom of Information Act (FOIA), which requires an agency to search all of its records, the Privacy Act requires only that the agency search systems of records. However, we require a search for relevant records under the Privacy Act to be conducted with the same rigor that we require for searches under the FOIA. See, e.g., *Carla Mink*, 28 DOE ¶ 80,251 (November 27, 2002) (Case No. VFA-0763).

We find that Richland's search for documents responsive to Mr. Wendling's request was reasonably calculated to uncover the documents he was seeking, in that Richland conducted its search in the locations where documents responsive to the request would most likely be found, based on the information available to Richland at the time of the request. We note here that, with the present Appeal, Mr. Spanner provided a document that memorializes the rescission of "the access denial on Marc Wendling." Appeal at 3. When we provided a copy of this document to Richland with the Appeal, Richland identified the document as originating from Fluor Hanford, Inc. (FHI), a DOE contractor that manages activities at the Hanford Site. Based on this document, Richland was able to locate additional responsive documents in the files of FHI. On January 17, 2008, Richland provided a copy of these documents to our office and to Mr. Spanner.

From the initial request submitted by Mr. Spanner, the circumstances of the denial of access to Mr. Wendling were not apparent. Therefore it would be reasonable for Richland to have assumed that Mr. Spanner was seeking personnel security records regarding Mr. Wendling, which would be maintained either by Richland's Security and Emergency Services Division, or by Mr. Wendling's employer, ESHI. Not until Richland received the additional document provided with the appeal did it become apparent that this was an issue involving physical security at the Hanford site, and that such documents would be in the possession of FHI. Thus, we conclude that Richland's search was adequate under the FOIA and Privacy Act.

B. Whether Documents in Mr. Wendling's ESHI Personnel File are Subject to Release Under the FOIA, Privacy Act, or DOE Regulations

The FOIA generally requires that documents held by federal agencies be released to the public on request. The Act does not, however, specifically set forth the attributes that a document must have in order to qualify as an agency record that is subject to FOIA requirements. This issue was addressed by the U.S. Supreme Court in *Department of Justice vs. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are "agency records" for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *Id.* at 144-45. This is the standard we have adopted in prior cases concerning this issue. *See, e.g., Ed Aguilar*, 28 DOE ¶ 80,252 (March 16, 2006) (Case No. TFA-0148). Under the FOIA, "agency" means any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . , or any independent regulatory agency." 5 U.S.C. § 552(f).

The Privacy Act generally requires that each federal agency permit an individual to gain access to information pertaining to him or her which is contained in any system of records maintained by the agency. 5 U.S.C. § 552a(d). The Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). The Privacy Act adopts the FOIA definition of "agency" set forth in the preceding paragraph. 5 U.S.C. § 552a(a)(1).

In the present case, documents responsive to the request in Mr. Wendling's ESHI personnel file were neither created by the DOE nor are in the possession or control of the DOE. Moreover, Mr. Spanner

does not contend, nor do we find, that ESHI, a privately-owned and operated DOE subcontractor, is an "agency." Consequently, these documents would not be an agency record for purposes of the FOIA or part of an agency system of records for purposes of the Privacy Act.

A finding that certain documents are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). The contractual provision governing ownership of records is found in the Department of Energy Acquisition Regulations at 48 C.F.R. § 970.5204-3, "Access to and ownership of records." Paragraph (a) of the contract clause required by this sections states:

(a) Government-owned records. Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.

48 C.F.R. § 970.5204-3(a). Paragraph (b) states, in pertinent part:

(b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.

...

(1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, except for those records described by the contract as being maintained in Privacy Act systems of records.

48 C.F.R. § 970.5204-3(b).

The documents provided to the requester and to our office subsequent to the filing of the present Appeal refer to a dispute between Mr. Wendling and his former employer, ESHI, as the basis for his denial of access to the Hanford site. Based on this information, we agree with Richland that documents in Mr. Wendling's ESHI personnel file related to his denial of access would fall under the purview of the "Employment-related records" paragraph of the ownership of records clause, and therefore such documents would not be the property of the Government. Therefore, these documents

would not be subject to release under the FOIA, Privacy Act or the relevant DOE regulations.³ We will therefore deny the present Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by Marc A. Wendling, OHA Case Number TFA-0241, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 5 U.S.C. § 552a(g)(1) (Privacy Act). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 6, 2008

³ Although we find in this decision that the responsive documents in the custody of ESHI are contractor-owned records, we make no finding here as to whether the responsive documents released by FHI, discussed in section II.A above, are government-owned or contractor-owned records under the contract between DOE and FHI. Because the responsive documents in the custody of FHI were released, the issue of their status under the contract between DOE and FHI is not before us.